No. 84-804

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Supreme Court of the United States

OCTOBER TERM, 1984

ROYAL DRUG COMPANY, INC. d/b/a
ROYAL PHARMACY OF CASTLE HILLS and
DISCO PRESCRIPTION PHARMACY, *et al.*,
Petitioners,

v.

GROUP LIFE AND HEALTH INSURANCE COMPANY a/k/a
BLUE SHIELD and/or BLUE CROSS-BLUE SHIELD
OF TEXAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Court of Appeals and the District Court correctly held that no significant probative evidence supported a finding that Respondents participated in a horizontal combination to restrain trade?

II. Whether the Court of Appeals and the District Court correctly held that the Pharmacy Agreements do not amount to *per se* unreasonable vertical restraints of trade?

III. Whether the Court of Appeals and the District Court correctly held that Petitioners failed to raise an issue under the rule of reason?

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BRIEF IN OPPOSITION

Respondents, Group Life and Health Insurance Company, also known as Blue Shield of Texas ("Blue Shield"), Walgreen Texas Co. ("Walgreen") and The Sommers Drug Stores Company ("Sommers"),[1] respectfully request the Court to deny the Petition For a Writ of Certiorari to review the Judgment entered in this case by

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[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, we note that Blue Shield is a wholly-owned subsidiary of Group Hospital Service, Inc., also known as Blue Cross of Texas. Walgreen Texas Co., formerly a wholly-owned subsidiary of Walgreen Co., was merged into Walgreen Co. in August, 1984. The Sommers Drug Stores Company is now known as Corrigan Enterprises, Inc.

the United States Court of Appeals for the Fifth Circuit on August 6, 1984.

STATEMENT OF THE CASE

A. Proceedings Below

This civil antitrust suit was filed in May, 1975, by eighteen pharmacy owners doing business in San Antonio, Texas, against Blue Shield, Walgreen and Sommers. Petitioners challenge under section 1 of the Sherman Act, 15 U.S.C. § 1, certain aspects of Blue Shield's prepaid prescription drug insurance program. Specifically, Petitioners attack the contracts between Blue Shield and individual pharmacies pursuant to which those pharmacies agree to provide prescription drugs to Blue Shield's insureds and are reimbursed therefor by Blue Shield.

In answer to the Complaint, Respondents originally set forth, *inter alia*, the affirmative defense that the prepaid prescription drug insurance plan constitutes the "business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, and thus is exempt from scrutiny under the federal antitrust laws.[2] Upon the conclusion of discovery directed to that affirmative defense, the parties agreed to submit the exemption issue for preliminary determination by the District Court. Thereafter, Respondents' motions to dismiss were granted. *Royal Drug Co. v. Group Life and Health Insurance Co.*, 415 F. Supp. 343 (W.D. Tex. 1976). The Court of Appeals reversed, holding that the McCarran-Ferguson exemption was inapplicable. *Royal*

[2] The procedural history and facts involved herein are set forth in the opinions of the Court of Appeals and the District Court, appended to the Petition For a Writ of Certiorari ("Petition"), as well as the opinion of this Court on the prior appeal of this case, No. 77-952, *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). References herein to the Petition appear as (Pet. at ——) and to the opinions below as (Pet. App. ——).

Drug Co. v. Group Life and Health Insurance Co., 556 F.2d 1375 (5th Cir. 1977). In a 5-4 decision, this Court affirmed that determination. *Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). As this Court noted, the only issue presented in the prior appeal was the applicability of the McCarran-Ferguson exemption. This Court also observed that "[w]hether the Agreements are *illegal* under the antitrust laws is an entirely separate question, not now before us," and "[i]t is axiomatic that conduct which is not exempt from the antitrust laws may nevertheless be perfectly legal." 440 U.S. at 210 & n.5 (emphasis in original; footnote omitted).

On remand, and following the completion of discovery, Respondents moved for summary judgment on the substantive issue of antitrust liability. After briefing by the parties, as well as oral argument, the District Court entered a Memorandum Opinion and Order granting Respondents' motions (Pet. App. at 1). The District Court also dismissed Respondents' counterclaims.

Petitioners appealed from that portion of the Memorandum Opinion and Order wherein the District Court determined that the prepaid prescription drug insurance plan does not violate the federal antitrust laws. Respondents did not appeal the dismissal of their counterclaims. In an opinion dated August 6, 1984, the Court of Appeals affirmed the District Court's decision (Pet. App. at 12). Petitioners' petition for rehearing was denied on September 26, 1984 (Pet. App. at 28).

B. Statement of Facts

Blue Shield is an insurance company duly authorized by the Texas State Board of Insurance to transact the business of life, health and accident insurance within

the State of Texas.[3] Petitioners, like Walgreen, each own and operate pharmacies in San Antonio, Texas. Sommers formerly owned and operated pharmacies in San Antonio. Nine of the eighteen Petitioners, as well as Walgreen, participate in Blue Shield's prepaid prescription drug insurance program challenged herein.[4]

1. *The Prescription Drug Insurance Program*

Blue Shield, like numerous other insurance companies,[5] offers prepaid prescription drug insurance coverage. These policies protect against the risk of financial loss occasioned by the need to purchase drugs prescribed by a physician. Blue Shield's prepaid drug policies are issued as part of group health insurance plans whereby Blue Shield insures employee groups for comprehensive health care benefits and employers pay part or all of the policy premiums.[6]

The policies obligate Blue Shield to insure its policyholders against the cost of prescription drugs in one of

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[3] All of the stock of Blue Shield is owned by Group Hospital Service, Inc., a non-profit hospitalization insurer organized under Chapter 20 of the Texas Insurance Code, TEX. INS. CODE. ANN. Art. 20.01 *et seq.* Group Hospital Service, Inc. also is known as Blue Cross of Texas.

[4] Sommers likewise participated in the program.

[5] Similar programs are offered by Aetna Life Insurance Company, Metropolitan Life Insurance Company, the United States Government and others. *See Feldman v. Health Care Service Corp.*, 562 F. Supp. 941, 943 & n.2 (N.D. Ill. 1982); *Arkansas Pharmacists Association v. Harris*, 627 F.2d 867 (8th Cir. 1980).

[6] The prepaid drug insurance program had its origins in 1967, when the United Auto Workers and the three largest domestic automobile manufacturers entered into a collective bargaining agreement establishing a prepaid prescription drug program, to become effective October 1, 1969, for U.A.W. members. Michigan Blue Shield was the first insurer to offer the program, and Blue Shield of Texas subsequently agreed to provide prepaid drug coverage for employees of Ford Motor Company and Chrysler Corporation living in Texas.

two ways: Primarily by contractual arrangements with pharmacies who agree to provide prescription drugs to the insureds in exchange for reimbursement by Blue Shield; and secondarily by partial cash reimbursement directly to the policyholder for amounts expended in the purchase of drugs from pharmacies that do not have a contractual arrangement with Blue Shield. The Participating Drug Pharmacy Agreement ("Pharmacy Agreement"), which is a bilateral contract between Blue Shield and individual pharmacies, is the principal mechanism through which prescription drug benefits are provided to insureds in accordance with Blue Shield's obligations under the policies.

2. *Mechanics of the Program*

Blue Shield's insureds are entitled to obtain prescription drugs from any pharmacy they choose. If the insured selects a pharmacy that has entered into a Pharmacy Agreement with Blue Shield (a "Participating Pharmacy"), the policy provides that the insured is required to pay no more than a $2.00 deductible for each prescription. Under the Pharmacy Agreement, a pharmacy agrees to dispense drugs to Blue Shield's insureds and to collect the $2.00 deductible from the insured.[7] The Participating Pharmacy then agrees to look directly to Blue Shield for reimbursement, which is obtained by filing a claim. Blue Shield agrees to reimburse the Participating Pharmacy for the acquisition cost of each dispensed drug, plus a dispensing fee, minus the amount of the deductible.[8] If the insured elects to have his or her prescription filled by a pharmacy other than a Par-

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[7] The pharmacy may "discount the deductible," *i.e.*, accept less than $2.00 from the insured, if it so desires.

[8] When the prescription drug program was instituted by Blue Shield in 1969, the amount of the dispensing fee was $2.00. Thereafter, in December, 1976, the dispensing fee was increased to $2.20. In October, 1981, the dispensing fee again was increased to $3.00.

ticipating Pharmacy, the policy provides that Blue Shield will reimburse the insured for 75% of the "usual and customary" charge for the drug after first subtracting the $2.00 deductible.

3. *History of the Program*

After receiving authorizaiton from the Texas State Board of Insurance to offer the prepaid drug insurance policy, Blue Shield sent a standard form letter to all licensed pharmacies in the State of Texas offering each the opportunity to enter into a Pharmacy Agreement. There were no negotiations with or among any pharmacies. Thereafter, Blue Shield issued the prepaid drug insurance policy to various groups and, in order to be able to provide the policy benefits, entered into Pharmacy Agreements with individual pharmacies throughout Texas.

In 1974, Blue Shield decided to offer a comprehensive health care plan, including prepaid prescription drug coverage, to various groups in the San Antonio metropolitan area. Through another mass mailing, Blue Shield again offered the opportunity of entering into a Pharmacy Agreement to all licensed pharmacies in San Antonio.

It is undisputed that the opportunity of entering into a Pharmacy Agreement with Blue Shield is, and always has been, available to all licensed pharmacies in Texas. Indeed, as noted above, nine of the Petitioners operate Participating Pharmacies in the San Antonio area. The decision of whether or not to enter into a Pharmacy Agreement with Blue Shield lies solely with each individual pharmacy. It is uncontroverted that Blue Shield developed the Pharmacy Agreement without consulting any pharmacy, that the same terms are offered to all pharmacies and that Blue Shield did not negotiate the terms of the Pharmacy Agreement with any pharmacy, but rather offered the Agreement to each individual pharmacy in the State of Texas on a "take it or leave it"

basis. Petitioners adduced no evidence—nor have they alleged—that Blue Shield is controlled or influenced by any pharmacy, or that Blue Shield agreed with any pharmacy concerning the reimbursement rate Blue Shield would offer in the Pharmacy Agreement.

REASONS FOR DENYING THE PETITION

Rule 17 of the Rules of the Supreme Court provides that a review on writ of certiorari "will be granted only when there are special and important reasons therefor." In an effort to meet this requirement, Petitioners seek to characterize the Pharmacy Agreements as price fixing, and then argue that because decisions of this Court hold that price fixing is illegal *per se*, the decisions of the Court of Appeals and District Court are contrary to established Supreme Court precedent. Petitioners' "boycott" argument is similarly tautological. Because decisions of the federal courts uniformly and correctly hold that the Pharmacy Agreements do not fall within the sphere of *per se* illegality, and because Petitioners from the inception of this case have eschewed the opportunity to challenge the Pharmacy Agreements as unlawful under the rule of reason, the Petition should be denied.

I. THE COURTS BELOW PROPERLY HELD THAT THE PHARMACY AGREEMENTS ARE NOT ILLEGAL PER SE

Petitioners' principal argument is that the Pharmacy Agreements constitute *per se* illegal price fixing, because they establish the compensation that Participating Pharmacies will receive on sales of prescription pharmaceuticals to Blue Shield insureds. As this Court acknowledged in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), however, not every arrangement that affects price constitutes *per se* illegal price fixing, because all commercial contracts affect price in some way:

> [T]his is not a question simply of determining whether two or more [parties] have literally "fixed" a "price". . . . Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally "price fixing," but they are not per se in violation of the Sherman Act. Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "per se price fixing."

441 U.S. at 8-9 (citation omitted). Applying these principles, and recognizing this Court's determination in the prior appeal of this case that "[t]he Pharmacy Agreements . . . are merely arrangements for the purchase of goods and services by Blue Shield," 440 U.S. at 214, as well as upon the Justice Department's position that the plan does not violate the antitrust laws, 440 U.S. at 210 n.5, the Courts of Appeals in *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross and Blue Shield of Connecticut, Inc.*, 675 F.2d 502 (2d Cir. 1982), *aff'g*, 518 F. Supp. 1100 (D. Conn. 1981) ("*Medical Arts*"), and *Sausalito Pharmacy, Inc. v. Blue Shield of California*, 677 F.2d 47 (9th Cir.), *cert. denied*, 459 U.S. 1016 (1982), *aff'g*, 544 F. Supp. 230 (N.D. Cal. 1981) ("*Sausalito Pharmacy*"), rejected application of *per se* analysis, and affirmed summary judgments entered in favor of Blue Cross and Blue Shield Plans "virtually identical" to the insurance program presented herein. Summary judgment also was entered in favor of the plan in *Feldman v. Health Care Service Corp.*, 562 F. Supp. 941 (N.D. Ill. 1982) ("*Feldman*").[9]

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[9] Analogous programs providing insurance coverage other than for prescription drugs likewise have been held not to violate the Sherman Act. *Kartell v. Blue Shield of Massachusetts, Inc.*, No. 84-1241 (1st Cir., Nov. 28, 1984); *Pennsylvania Dental Association v. Medical Service Association of Pennsylvania*, 745 F.2d 248 (3d Cir. 1984); *Proctor v. State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982); *Quality Auto Body, Inc. v. Allstate Insurance Co.*, 660 F.2d 1195 (7th Cir.

The Petition is barren of even a citation to the foregoing decisions upholding the prepaid prescription drug insurance plan. Moreover, Petitioners do not identify a single federal court decision even suggesting that the Pharmacy Agreements constitute a *per se* violation—whether "price fixing," "boycott" or otherwise—of the Sherman Act. As demonstrated below, Petitioners' failure to raise a conflict between the decisions below and a decision of this or another Court simply serves to betray the fact that Petitioners' attempted characterization of the Pharmacy Agreements as illegal *per se* is contrary to well-settled antitrust principles.

A. Price Fixing

Petitioners' first argument is that the prepaid prescription drug program constitutes *per se* illegal price fixing (Pet. at 13-22). Although Petitioners refrain from explicitly casting the Pharmacy Agreements either as horizontal or vertical price fixing, the decisions cited by Petitioners embrace both theories. As the federal courts—as well as the Justice Department—have uniformly determined, neither characterization is appropriate under the circumstances of this case.

1. *Horizontal Price Fixing*

A horizontal price fixing arrangement, of course, is one between direct competitors, whereas a vertical price

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1981), *cert. denied*, 455 U.S. 1020 (1982); *Davidowitz v. San Diego County Dental Society*, 1983-1 Trade Cas. ¶ 65,221 (S.D. Cal. 1983); *Michigan State Podiatry Association v. Blue Cross and Blue Shield of Michigan*, 1982-2 Trade Cas. ¶ 64,801 (E.D. Mich. 1982); *Blue Cross and Blue Shield of Michigan v. Michigan Association of Psychotherapy Clinics*, 1980-2 Trade Cas. ¶ 63,351 (E.D. Mich. 1980). *See also Arkansas Pharmacists Association v. Harris*, 627 F.2d 867 (8th Cir. 1980) (similar plan promulgated by Secretary of HEW in connection with Medicare program; summary judgment in favor of the government upheld).

fixing arrangement is one between firms at different levels in the chain of distribution, *e.g.*, between manufacturer and distributor, or between wholesaler and retailer. *See Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Recognizing that "not every agreement that has an impact on price, either vertically or horizontally, is a *per se* violation of the Sherman Act," and that "[t]he proper inquiry, thus, is not whether a particular agreement literally fixes a price, but whether the agreement is so 'plainly anticompetitive' and so very likely without 'redeeming virtue' that a court will apply the label '*per se* price fixing,'" *citing Broadcast Music*, 441 U.S. at 8-9, the Court in *Medical Arts* summarily rejected the attempt by the plaintiffs therein to bring the Pharmacy Agreements within the ambit of this Court's decisions condemning horizontal price fixing:

> Plaintiffs contend that the pharmacy agreements are a form of horizontal price-fixing and, hence, *per se* unlawful. This characterization completely ignores the relationship of the parties. Blue Cross is neither a seller in competition with retail pharmacies, nor a manufacturer or wholesaler in competition with suppliers of pharmaceuticals. Rather, as discussed at length in *Group Life & Health Insurance Co. v. Royal Drug Co., supra*, Blue Cross buys prescription drug products for their insureds. There has been no showing, indeed, no claim, that Blue Cross has conspired with other third-party payors who offer comparable prescription drug plans. Plaintiffs' suggestion that Blue Cross has somehow facilitated an unlawful horizontal conspiracy among participating pharmacies is similarly unpersuasive. The question, for purposes of a horizontal analysis, is whether Blue Cross has conspired with *its* competitors to restrain trade. The answer is that it clearly has not.

518 F. Supp. at 1106, *aff'd*, 675 F.2d at 505 (emphasis in original).[10]

In its *Amicus* Brief filed in this Court in the prior appeal of this case, the Justice Department further explained these principles:

> As a general matter, however, antitrust principles would not preclude the offering of prepaid health insurance programs that use insurer-provider agreements. For example, the pleadings in this case indicate that the Pharmacy Agreements are bilateral contracts for the purchase of goods and services by Blue Shield. Blue Shield has offered to purchase drugs and pharmacy services from any pharmacy that will accept acquisition cost plus [the dispensing fee]. *Unless respondents could establish that some conspiracy among pharmacies is at work the Pharmacy Agreements would not amount to "price fixing."* Transactions at a set price, through a series of voluntary bilateral contracts, are not price fixing even though large numbers of sellers of services may be involved.

Amicus Brief at 10-11 (citations omitted; emphasis added).

Petitioners' attempt to invoke the theory of "conscious parallelism" to establish concerted action between pharmacies likewise was properly rejected by the Courts below. As the Fifth Circuit explained in *Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1027 n.27 (5th Cir. 1983):

> In order to avoid a motion for summary judgment, a claimant must come forward with significant probative evidence supporting its theory of conscious

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[10] The foregoing analysis fully applies to the present case. Blue Shield is neither a seller of prescription drugs, nor a manufacturer or wholesaler in competition with suppliers of pharmaceuticals. There has been no allegation that Blue Shield conspired with other insurers who offer comparable prescription drug programs.

> parallelism with, as it has often been stated, some "plus" factor which tends to indicate that the asserted unilateral behavior was not such in fact, *e.g.*, that the decisions not to deal were contrary to defendants' economic self-interest so as to raise an issue of good faith business judgment.

Citing Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954).[11] *Accord, Pan Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 559 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981). Respondents submitted substantial summary judgment proof —which was uncontroverted by Petitioners—denying the existence of a conspiracy and asserting that the Pharmacy Agreements were entered into pursuant to the independent exercise of sound business judgment. Furthermore, as the Courts below recognized, Petitioners' theory of a conspiracy among pharmacies and Blue Shield is counter-intuitive, because neither Blue Shield nor the pharmacies have an incentive to conspire: Any effort by pharmacies to raise prices or reduce competition among pharmacies from whom Blue Shield might purchase would

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[11] For this reason, Petitioners' purported reliance on *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208 (1939); *U.S. v. Masonite Corp.*, 316 U.S. 265 (1942); and *U.S. v. United States Gypsum Co.*, 333 U.S. 364 (1948), is misplaced. Each of those cases involved interdependent action. For example, in *Interstate Circuit*

> [e]ach [competitor] was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business and good will of subsequent-run and independent exhibitors, but that with it there was the prospect of increased profits.

306 U.S. at 222. *Accord, Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1027 n.27 (5th Cir. 1983). Moreover, contrary to Petitioners' implicit suggestion (Pet. at 20), the defendant in *Masonite* was a competitor of the other members of the combination, thus presenting a classic horizontal price fixing conspiracy.

be resisted—not encouraged—by Blue Shield.[12] Similarly, the Courts below correctly noted that pharmacies would have no interest in conspiring among themselves to sign the Pharmacy Agreements, because such a conspiracy would result in *more* competition among pharmacies for the patronage of Blue Shield's insureds, thus reducing the market shares of all. In light of Respondents' uncontroverted affidavits and deposition testimony demonstrating independent business reasons for entering into the Pharmacy Agreements, and Petitioners' total failure to demonstrate that interdependent action among pharmacies was necessary for each to derive benefit from those Agreements, the Courts below properly rejected Petitioners' conscious parallelism theory.[13]

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[12] The Justice Department made this point in its *Amicus* Brief (*Amicus* Brief at 14 n.6).

[13] The Courts below likewise properly rejected Petitioners' argument that the Pharmacy Agreements are unlawful under *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). Contrary to Petitioners' suggestion, this Court in *Maricopa* expressly noted that the arrangement challenged therein was "an agreement among competing physicians"—a classic horizontal restraint. 102 S. Ct. at 2469. Indeed, this Court expressly distinguished *Maricopa* from the arrangement challenged herein:

> Nor does this case present the question whether an insurer may, consistent with the Sherman Act, fix the fee schedule and enter into bilateral contracts with individual doctors. That question was not reached in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L. Ed. 2d 261 (1979). In an *amicus curiae* brief, the Department of Justice expressed its opinion that such an arrangement would be legal unless the plaintiffs could establish that a conspiracy among providers was at work. *Our point is simply that the record provides no factual basis for the respondents' claim that the doctors must fix the fee schedule.*

102 S. Ct. at 2478 n.26 (emphasis added; citations omitted).

2. *Resale Price Maintenance*

Petitioners argue alternatively that the Pharmacy Agreements constitute *per se* illegal vertical price fixing. As the Court in *Medical Arts* noted, this Court's decisions do not support such a characterization:

> This argument, though facially more plausible, is nonetheless unavailing. Even assuming *Albrecht* [*v. Herald Co.*, 390 U.S. 145 (1968)] and *Kiefer-Stewart* [*Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951)] can be read in the expansive manner suggested by plaintiffs, the pharmacy agreements differ in several important respects from the typical agreement between a manufacturer and a distributor establishing resale prices; most significantly, under the pharmacy agreements, there is no resale of anything. *Cf. Sausalito II* at [234] n.1. The only price that is established by the pharmacy agreement is the price that Blue Cross will pay participating pharmacies for prescribed drugs. "The price-fixing within the scope of the *per se* prohibition of § 1, however, is an agreement to fix the price to be charged in transactions with third parties, not between the contracting parties themselves."

518 F. Supp. at 1106-07, *aff'd*, 675 F.2d at 505-06, *quoting Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440, 446 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978) (footnote omitted). *Accord, Sausalito Pharmacy*, 544 F. Supp. at 234 n.1.

The foregoing logic, adopted by the Courts below, is irrefutable. Resale price maintenance is, by definition, a seller's control over the price at which its customer resells. Yet, Blue Shield sells nothing to pharmacies. Because the decisions below are fully in accord with this Court's pronouncements concerning resale price maintenance, Petitioners' invitation to expand the *per se* rule should be declined.

3. *Blue Shield's Status As A "Purchaser" Is Not An Issue*

Contrary to Petitioners' suggestion, Blue Shield's status as a purchaser is not an issue. Relying upon this Court's determination in the prior appeal of this case that the Pharmacy Agreements "are merely arrangements for the purchase of goods and services by Blue Shield," 440 U.S. at 214, the Courts in *Medical Arts* and *Sausalito Pharmacy* held that the Pharmacy Agreements are not *per se* illegal for the additional reason that they are agreements between purchaser and seller. 518 F. Supp. at 1109, *aff'd*, 675 F.2d at 505; 544 F. Supp. at 233, *aff'd*, 677 F.2d 47. More important, however, is the fact that whereas a determination that Blue Shield is the "purchaser" precludes application of the *per se* rule, it does not follow that the "price fixing" rubric attaches absent such a determination. Rather, as the Second Circuit in *Medical Arts* emphasized, *regardless* of whether Blue Shield is characterized as a "purchaser" or "indemnitor," this Court's decisions do not support application of the *per se* rule:

> Whether Blue Cross is characterized as a purchaser or simply as an indemnitor or third-party payor, it is the ultimate payor, and therefore its prescription drug plan differs significantly from the vertical arrangements to restrict resale prices that were invalidated in *Albrecht* and *Kiefer-Stewart*.
>
> . . .
>
> In short, the challenged conduct by Blue Cross is not governed by *Albrecht* and *Kiefer-Stewart*, but is *sui generis*. Although the pharmacy agreements do fix prices, and are not precisely between seller and purchaser (but between seller and indemnitor), they are not manifestly anticompetitive. Nor do we find that the pharmacy agreements at isuse here "on [their] face [have] the effect, or could have been spurred by the purpose, of restraining competition among the

individual [pharmacies]." *Broadcast Music, Inc.*, 441 U.S. at 13, 99 S. Ct. at 1559.

Accord, Pennsylvania Dental Association v. Medical Service Association of Pennsylvania, 745 F. 2d 248, 256-59 (3d Cir. 1984).

Simply stated, the Courts below—like the Circuit and District Courts in *Medical Arts, Sausalito Pharmacy* and *Feldman*—correctly recognized that although a determination that Blue Shield is the purchaser precludes application of the *per se* rule, it does not follow that if Blue Shield instead is characterized as an indemnitor, the *per se* rule then applies. Because under either characterization Blue Shield neither sells prescription pharmaceuticals to pharmacies nor competes with them, the Pharmacy Agreement is not the type of arrangement to which this Court has applied the *per se* rule, and the Courts below, like the Courts in *Medical Arts, Sausalito Pharmacy* and *Feldman*,[14] thus properly declined Petitioners' invitation to expand the parameters of *per se* liability.[15]

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[14] In light of the fact that the Courts in *Medical Arts, Sausalito Pharmacy* and *Feldman* characterized the plans involved therein as "virtually identical" to the plan *sub judice*, and, indeed, specifically relied both on this Court's decision in the prior appeal of the present case, as well as on the Justice Department's *Amicus* Brief filed therein, *see Sausalito Pharmacy*, 544 F. Supp. at 233, *aff'd*, 677 F.2d 47; *Medical Arts*, 518 F. Supp. at 1109, 1110 n.10; 675 F.2d at 505; *Feldman*, 562 F. Supp. at 946 n.3, 948, Petitioners' conclusional suggestion that those cases are distinguishable (Pet. at 23 n.6) cannot withstand scrutiny.

[15] For the same reason, Petitioners' argument that "non-competitors are not exempt from the Sherman Act" (Pet. at 18) is irrelevant. It is one thing to acknowledge that participation by a non-competitor in an otherwise unlawful combination will not save the arrangement from a finding of illegality. It is, of course, quite another to suggest—as Petitioners apparently seek to do—that participation by a non-competitor in an otherwise *lawful* arrangement somehow mandates a finding of illegality. Similarly, Petitioners' suggestion that the Fifth Circuit held that price fixing is lawful absent proof of monopoly power (Pet. at 25) is,

B. Group Boycott

Petitioners' alternate *per se* theory is one of "group boycott." Petitioners argue that because, under the Pharmacy Agreements, it is economically more advantageous for insureds to patronize participating, rather than non-participating, pharmacies, Blue Shield has entered into a *per se* unlawful combination with its insureds to boycott non-participating pharmacies. The Courts below likewise properly rejected this theory. As both Courts noted, it is undisputed that Blue Shield always has offered the Pharmacy Agreement to all licensed pharmacies in the State of Texas, and that non-participating pharmacies do not deal with Blue Shield because *they* have chosen not to do so (Pet. App. at 10-11, 26).

In light of such uncontroverted facts, Blue Shield's unilateral insistence on certain terms in its contract with Participating Pharmacies is not the type of conduct to which the *per se* rule has been applied, and again, Petitioners have failed to identify contrary authority. Indeed, courts assessing boycott allegations leveled against similar plans have rejected Petitioners' position. For example, in *Quality Auto Body, Inc. v. Allstate Insurance Co.*, 660 F.2d 1195 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982), the Seventh Circuit upheld summary judgment in favor of an auto repair insurance plan against the claim that the plan constituted a group boycott. Finding that although some repair shops that refused to accept the reimbursement rates offered by the insurers "may suffer some economic losses, these losses appear basically to be the result of the shops' inability or unwillingness to meet competition," the Seventh Circuit held that "the district court properly concluded that

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charitably, an arrant mischaracterization of that Court's opinion, which holds simply that *absent* price fixing, *and absent* proof of monopoly power, "Blue Shield has the clear right to bargain for the lowest price and best deal for itself and its customers/insureds" (Pet. App. at 24).

defendants' actions do not constitute an unlawful boycott and granted summary judgment on this claim." 660 F.2d at 1206. *Accord, Pennsylvania Dental Association v. Medical Service Association of Pennsylvania*, 745 F.2d 248, 259-60 (3d Cir. 1984). Because these principles are fully consistent with this Court's recognition that, absent concerted action or abuse of monopoly power, it is not unlawful to insist on standard terms in commercial dealings, *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), no issue appropriate for certiorari is presented.

II. THE COURTS BELOW CORRECTLY CONCLUDED THAT PETITIONERS DID NOT RAISE OR PURSUE A CLAIM UNDER THE RULE OF REASON

Under a rule of reason analysis, the Court must weigh "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). This analysis requires a review of the facts peculiar to the business, the history of the challenged arrangement and the reasons why it was adopted. In short, the arrangement's overall impact on competitive conditions, rather than a plaintiff's claimed individual injury, is the determinative factor. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

The Complaint in the present case alleges only that the prepaid prescription drug plan is illegal *per se* as price fixing and a group boycott. Similarly, as both the District Court and the Court of Appeals acknowledged, throughout the entire course of this litigation Petitioners have ardently and consistently disavowed any intention to proceed under the rule of reason, and as late as the hearing on the motions for summary judgment Petitioners reiterated their decision to proceed solely on the theory of *per se* illegality. As the District Court noted, Petitioners —like the plaintiffs in *Medical Arts*—"have placed all

their eggs in the *per se* basket" (Pet. App. at 8), *quoting* 518 F. Supp. at 1109. The Court of Appeals agreed: "The plaintiffs have pled and tried this case as a *per se* case" (Pet. App. at 24).

Assuming *arguendo*, as did the District Court and the Court of Appeals, that Petitioners intended to pursue a rule of reason claim, both Courts properly held that Petitioners failed to raise a genuine issue of material fact thereunder. In the face of Respondents' summary judgment proof, which set forth competitive justifications in support of the plan, Petitioners eschewed the opportunity to come forward with evidence to support their conclusional claim that the alleged price fixing "eliminates competition." As the Court of Appeals noted, "[e]ven if the complaint be broadly construed to allege predatory pricing or monopoly pricing by an insurer with dominant power in the drug-purchasing market, the plaintiffs' case fails under the rule of reason, for they have presented no evidence that goes beyond 'unsupported conjecture' as to either of these theories, and hence cannot forestall summary judgment," (Pet. App. at 25), *citing Walker v. U-Haul Co. of Mississippi*, 734 F.2d 1068, 1072 (5th Cir. 1984).[16] Because Petitioners neither attempted to show what portion of total prescription drug sales are made under the Pharmacy Agreements, nor adduced any other evidence of market power or anticompetitive effects, the Courts below correctly determined that Petitioners failed to raise an issue under the rule of reason. Again, this result is fully supported by *Medical Arts, Sausalito Pharmacy* and *Feldman*, and Petitioners have cited no contrary authority. Accordingly, review on certiorari is not warranted.

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[16] In addition, Petitioners eschewed the opportunity to allege or adduce evidence in support of a claim of predatory pricing by pharmacies, which, as the Government noted in its *Amicus* Brief, is the one instance in which the interests of Blue Shield and the pharmacies theoretically might converge (*Amicus* Brief at 14 n.6.)

CONCLUSION

For the foregoing reasons, the Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

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